

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION**

LYNWOOD MANOR¹

Employer/ Petitioner

and

Case 7-UC-597

**LOCAL 79, SERVICE EMPLOYEES
INTERNATIONAL UNION²**

Union

APPEARANCES:

Lou Capozzi, Attorney, of Harrisburg, Pennsylvania, for the Employer/Petitioner.
Clifford L. Hammond, Attorney, of Detroit, Michigan, for the Union.

DECISION AND ORDER

Upon a petition filed under Section 9(b) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record³ in this proceeding, the undersigned finds:

¹ The name of the Employer appears as amended at the hearing. The Union's brief refers to the Employer as Horizon/CMS Healthcare Corporation d/b/a Lynwood Manor Nursing Home.

² The name of the Union appears as amended at the hearing.

³ Briefs were due from the parties on May 25, 2006. The Union filed a timely brief, which was carefully considered. By facsimile dated May 24, Counsel for the Employer requested an extension of time to file briefs from May 25 to May 30. Even though the Union had already filed its brief, it concurred in the extension request. The Employer's request was granted on the condition that neither Employer counsel nor anyone at his firm would read the Union's brief prior to submission of the Employer's brief. The Region received the Employer's brief by e-mail submission from Employer counsel on May 30 at 8:23 p.m. Counsel noted that he had been attempting to transmit the brief via fax to the Region without success. Counsel for the Employer express-mailed an original copy of the brief on May 31, which arrived at the Region on June 1. Pursuant to Office of the General Counsel Memoranda OM 03-74 and OM 04-32, outside parties may not electronically transmit to a Regional Office any documents, including briefs in representation cases, that are required by the Board's Rules and Regulations to be filed by a date certain. Under the provisions of Section 102.67 of the Board's Rules and Regulations, briefs in representation

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.

Bargaining and Procedural History

The Employer operates a 99-bed skilled nursing home facility in Adrian, Michigan. In about October 2005, an unspecified corporate change took place and the Employer took over operation of the Adrian facility. It secured a management company to manage the facility, which was previously managed by another management company. The Employer has recognized the Union since that time as the collective bargaining representative of two units of employees. The first unit, a service and maintenance unit, including nursing assistants (CNAs), housekeeping employees, laundry employees, and dietary employees, has been represented by the Union since about 1975, when the Union was certified in Case 7-RC-12880. There are approximately 45 to 50 CNAs in this unit. The second unit, consisting of registered nurses (RNs) and licensed practical nurses (LPNs), has been represented by the Union since October 1997, when the Union was certified in Case 7-RC-21134. There are approximately 12 employees, including 11 LPNs and 1 RN, in this unit. The current collective bargaining agreement for the service and maintenance unit is effective April 1, 2004 through March 31, 2007. The collective bargaining agreement for the RN/LPN unit was effective June 3, 2003 through June 2, 2006.⁴

The Employer asserts that the 12 nurses in the RN and LPN unit are statutory supervisors. It seeks to clarify the unit out of existence. The Union responds that the petition is not timely because there have been no significant or substantial modifications of the LPN and/or RN job assignments and duties, and the parties recently engaged in wage negotiations at which time the Employer did not raise supervisory allegations. It also argues that the nurses are not supervisors. I conclude, for the reasons set forth below, that the petition is timely. I further conclude that the LPNs and RNs are statutory employees.

matters are to be filed by a date certain. As for the Employer's attempt to submit the brief by facsimile, under Section 102.114 of the Board's Rules and Regulations, facsimile transmissions of briefs will not be accepted for filing. Accordingly, the Employer's brief mailed on May 31 and received June 1 was not timely filed and was not considered.

⁴ The record indicates that a predecessor employer, Trans Healthcare, Inc., negotiated the collective bargaining agreements with the Union.

Overview of Operations

The Employer provides around-the-clock long-term skilled and basic nursing care to its approximately 86 residents. Residents are arranged in two wings, A Wing and B Wing, with two units in each wing: A North, A South, B North and B South. There are approximately 20 residents per unit who reside in single, double, and triple rooms. The facility is run, and its 150 employees are supervised, by Administrator Susan Stoddard. All department heads report to Stoddard. The nursing department is headed by Director of Nursing (DON) Karrie Burgus. Under Burgus are Assistant DON Avis Hernandez; MDS Coordinator Stephanie Vetter; Staff Development/Wound Nurse Laura Colburn; Restorative Nurse Val Robison; Human Resources Director Pam Carlson; and second shift RN Supervisor Renee Setleff. The maintenance supervisor, dietary supervisor and activities supervisor also report to Burgus. The parties agree that all of the above individuals are appropriately excluded from the bargaining unit.

Employees are assigned to one of three eight-hour shifts: 7:00 a.m. to 3:30 p.m., 3:00 p.m. to 11:30 p.m., and 11:00 p.m. to 7:30 a.m. The administrator, DON, and other acknowledged management officials generally work between the hours of 8:00 a.m. and 5:30 p.m. on weekdays, and are present for most of the day, and part of the afternoon, shift. The day shift nurses report directly to the DON and ADON. The afternoon shift nurses report to the DON and ADON only for a limited period of time. During the midnight shift, there are no supervisory personnel present at the facility. However, non-bargaining unit RNs, who are part of the Employer's management staff, are regularly assigned on a weekly rotating basis as on-call staff after hours and on weekends. Additionally a physician, the DON, ADON and other management officials are always available on-call if an on-call RN is not available or should a situation arise that requires management discretion and judgment.⁵

On the day and afternoon shifts, about four nurses are assigned to wings A and B. On the midnight shift, about two nurses and five CNAs are assigned to wings A and B. Although the record is unclear regarding the number of CNAs assigned on the day and afternoon shifts, it appears that the average working ratio on these shifts is approximately one nurse to two and one-half to four CNAs.

Staff Nurse Authority

Conceding that the nurses do not possess all of the primary indicia of supervisory authority outlined in Section 2(11) of the Act, the Employer contends

⁵ There is record evidence that one bargaining unit RN, Donna Lennard, also rotates as part of the on-call staff for one week every five to six weeks.

that they nonetheless have the authority to make decisions, or effective recommendations, regarding assignments, direction, transfers, training, evaluation, adjustment of grievances, discipline, and discharge of employees. All of the evidence focused on nurses' oversight of CNAs and no evidence was presented regarding nurses' authority regarding non-nursing personnel.

The nurses spend an undisclosed, but significant portion of their shift engaged in actual nursing duties. They consult with the departing nurse for updates on residents' condition; make rounds of the residents; pass medications; perform treatments; monitor intravenous lines;⁶ and document events, procedures, and health conditions of the residents.

Scheduling, Assignments, Responsible Direction, Transfers

The nurses are not involved in scheduling CNAs for work. Rather, the CNA schedules are prepared by ADON Hernandez on the day and afternoon shifts, and Human Resources Director Carlson on the midnight shift. These CNA schedules include wing and unit assignments. CNAs often remain assigned to the same unit. Within the units, the resident rooms are divided into sections for the purpose of CNA responsibilities. The number of rooms and CNA job assignments in each section are prescribed by the Employer based on the number of CNAs on the unit. The nurses assign CNAs to a specific group of resident rooms by three-day rotations. The record does not indicate that the nurses take into account the skills of the CNAs when assigning resident rooms. A nurse may reassign a CNA to a different room upon request of a resident.

The nurse writes in the name of the CNA who is to perform the pre-assigned duties on pre-printed assignment sheets which are kept at each nurses' station. The assignment sheet lists the discrete tasks to be performed on each resident, e.g., bathe, toilet, feed, take vital signs. The nurse may also add routine assignments based on resident needs and medical condition. For example, a resident who has fallen is regularly monitored for vital signs and checked for neurological concerns over the 72 hours following the fall, per Employer policy.

At the start of each shift, the nurse takes report from the outgoing nurse, gives report to the CNAs on shift, and provides them their assignment sheets. The discussion with the CNAs includes updates on the residents' conditions, any special orders by physicians, and other issues relevant to resident care. The nurse then passes medications, performs treatments, completes charting, and follows up on any change in the condition of residents. When required, the nurses accompany physicians on rounds and respond to any resident emergencies.

⁶ Only RNs can start intravenous lines. However, both RNs and LPNs can monitor them.

The duties of the CNAs include basic care of residents and assistance with daily living functions, such as walking, toileting, bathing, dressing, feeding, and hygiene. The nurse assigned to an individual unit is responsible for monitoring the assignments given to the CNAs, and initials the CNAs' assignment sheets as they complete their assigned tasks. In this respect, the nurse may assign and direct the CNAs regarding enforcement of certain Employer policies, such as appropriate bathing, lifting, or transferring of residents. At the end of the shift, the nurses collect all of the CNA assignment sheets and place them into an assignment book which is turned into the DON at the end of each month. Additionally, the nurses use the assignment sheets, as well as their own nursing observations during the shift, to complete a 24-hour report form which documents any unusual occurrences regarding the residents for that particular shift. The 24-hour report is turned into the DON at the end of each 24-hour period.

Based on staffing needs, nurses may request CNAs to stay over to the next shift and work overtime, or send CNAs home when the facility is overstaffed. The nurse will ask for volunteers based on highest to lowest seniority to either stay or go home. If there are no volunteers, the nurses are instructed to direct employees to stay or send employees home based on lowest to highest seniority. Likewise, nurses may request CNA volunteers to work in a different unit or wing based on staffing needs, and may direct the transfer based on lowest to highest seniority if there are no volunteers.

Nurses possess authority to deny a CNA's request to leave early based on staffing needs. They also can send a CNA home during her scheduled shift for refusing to follow a nurse directive or, if the nurse believes it is clearly warranted, for egregious misconduct. When sending home a CNA, the nurse is required to complete an incident report and immediately inform the DON, who conducts her own independent investigation and decides, in conjunction with the administrator, whether discipline or termination is appropriate.

The nurses do not possess authority to grant CNA schedule changes or time-off requests. Rather, CNAs go directly to the DON, ADON, or Central Supply Director Janet Sevit for approval for schedule changes, and time-off and vacation requests. All leave requests also must be approved by human resources. CNAs on the first shift are directed to call in sick to the DON or ADON, who then completes a call-in slip and turns it into human resources director Carlson for placement in the employee's personnel file. CNAs on the afternoon and midnight shifts are directed to call in sick to the unit nurse on duty, who completes a call-in slip and turns it into Carlson.

Breaks and lunch periods are predetermined and required by the CNA union contract. The nurses are authorized to designate and rearrange break and lunch times for the CNAs to meet the exigencies of patient care and staffing.

Training and Evaluations

The nurses are authorized to assign a more experienced CNA to provide on-the-job training to a newly hired CNA. The nurses notify the DON if a CNA is not understanding her job duties or performing them adequately after being thoroughly trained by another CNA and/or the unit nurse. The DON then will meet with the CNA independently to discuss her lack of understanding and take any further action, if necessary.

The Employer presented evidence of pre-printed “nursing orientation” sheets, check-off lists for various nursing tasks, that the unit nurses complete for other newly hired nurses during nursing orientation. The record contains no evidence as to what is done with these nursing orientation sheets or the effect, if any, on the new employees' employment. The Employer also presented evidence that bargaining unit RN Lennard voluntarily completed a “train the trainer” program, certifying her to provide certification training to non-certified CNAs. Lennard voluntarily conducts this CNA training at the Employer's facility, about one to two times a year, mostly for individuals not employed by the Employer, as part of a State organized community service program.

The CNAs receive annual performance evaluations. When a CNA is up for an evaluation, the human resources director posts her name on the bulletin board by the time clock. At that time or periodically throughout the year, the unit nurse on the assigned shift receives pre-printed forms from human resources, called “Competency Evaluation Form” and “CENA Skills Assessment,” which are checklists of various CNA skills that the nurse checks off as either being demonstrated or not demonstrated satisfactorily by the CNA. Once the nurse completes the check list, she turns it over to human resources without any further communication regarding the evaluation or the CNA's job performance. No additional evidence was presented regarding what, if anything, is done with the check lists completed by the nurse and the effect they have, if any, on the CNA's employment. Nurses do not meet with CNAs regarding their annual evaluations and are not consulted by the DON or administrator, who are ultimately responsible for deciding whether to retain a CNA based on job performance. The CNA evaluations have no effect on their wages, which are contractually determined.

Adjustment of Grievances

The nurses do not participate in the CNA grievance procedure. The nurses are responsible for attempting to resolve interpersonal conflict between CNAs and may separate CNAs from each other to different areas within the same unit, different units, or different wings.

Discipline and Discharge

The Employer contends that the nurses have the authority to issue verbal warnings and disciplinary write-ups to CNAs. All employees are expected to report infractions of Employer policies and procedures by other employees as to the treatment of residents. Nurses are responsible for verbally communicating with any CNAs who commit infractions of Employer policies or procedures regarding either performance of job duties or treatment of residents or other employees.⁷

DON Burgus testified that she encourages the nurses to work performance problems out verbally with CNAs and, if they are not successful, to complete a “One on One Educational Inservice” and forward it to her. The one-on-one forms are kept at all of the nurses’ stations and specifically note: “This form is not disciplinary in nature. This notice is to be placed in the employee’s file to record Educational Inservices that have occurred. This is to plan goals, and note goals met for periodic employee evaluations.” The educational inservice form describing the incident is submitted to the DON for placement in the employee personnel file. DON Burgus testified that the educational inservice action is not intended to be disciplinary action, but rather to explain a procedure or policy to a CNA and ensure they know how to do something a particular way. The form is signed by the CNA on the line noting “employee signature” and by the nurse on the line noting “supervisor signature.” The nurses do not have access to CNA disciplinary records and are not aware of their disciplinary histories.

The unit nurse is responsible for reporting any incident in writing to the DON regarding CNA infractions of Employer policies relating to treatment of residents or other employees. The DON then conducts an independent investigation by gathering statements from all employees involved in or aware of the incident. This procedure was followed with regard to one specific incident described on the record. The DON is ultimately responsible for determining what level of discipline, if any, should issue without further consultation with the nurse who originated the incident report. The record does not indicate that the nurses are routinely made aware of the disciplinary action taken by the DON. Discharge

⁷ The Employer did but provide its written policies, procedures, and work rules.

decisions are the province of the administrator and DON. Nurses are limited to making factual reports that are subject to additional scrutiny and investigation by the DON.

Other Factors

The job descriptions used by the Employer for LPNs and RNs was originally prepared by a predecessor employer, Trans Healthcare, Inc. On their face, they invest the nurses with the authority, inter alia, to supervise and coordinate nursing staff in providing direct resident care; participate in performance evaluations of nursing staff; discipline nursing staff based on corporate and facility policies and procedures; utilize effectively the general principles of leadership and supervision; and participate in orientation of new employees.

Nurses have no role in interviewing candidates for hire or making hiring decisions. Although they may casually request that a friend or colleague receive consideration, nurses are not asked for, and do not offer, formal hiring recommendations. Nurses do not play a part in deciding whether a layoff or recall will occur, nor in determining who will be laid off or recalled. There is no evidence that nurses are included in any management meetings.

The Employer contends that the nurses' responsibility to complete discharge documents for residents confers supervisory status. The record evidence demonstrates that once the nurses receive a discharge order from social worker Serena McLaughlin, they call a physician to confirm the order to release the resident. The nurses then complete the discharge papers by looking at the resident chart, and providing relevant information regarding resident condition and medications. The nurses provide a signed one-page document to the resident and his/her family with discharge instructions.

At the start of the midnight shift, the facility is locked down and the nurses possess keys, kept at the nurses' station, to let people in. However, the nurses do not keep the keys after their shift. The keys are left at the nurses' station.

Analysis

Timing of the Petition

The Union argues that the petition is untimely because (1) the nurses have long been included in the bargaining unit with unchanged work duties, and (2) after the Employer assumed the contract, it did not raise any issue regarding the

nurses' asserted supervisory status despite engaging in negotiations with the Union over wages of unit employees.

Where a position or classification has historically been excluded from or included in a unit, and there have not been recent, substantial changes that would call into question the placement of the employees in the unit, the Board generally will not entertain a petition to clarify the status of that position, regardless of when in the bargaining cycle the petition is filed. *Bethlehem Steel Corp.*, 329 NLRB 243, 244 (1999). As an exception to this general principle, the Board will clarify a unit to exclude a position or classification that has historically been included in the unit where the petitioner has established a statutory basis for the exclusion, e.g., that the individuals are statutory supervisors. *Id.* at 244 fn. 5. In those situations, the only issue as to whether the Board will entertain the petition is whether it is filed at an appropriate time. *The Washington Post Co.*, 254 NLRB 168, 168-169 (1981).

The Union notes that the parties engaged in collective bargaining for wages about one year ago and the Employer did not raise the issue of supervisory status. However, the instant petition was filed on April 12, 2006, less than two months prior to the nurse contract expiration date of June 2. Thus, I find that the petition, having been filed near expiration of the existing contract, before negotiations on a new contract, is timely. See *Shop Rite Foods, Inc.*, 247 NLRB 883 (1980)(petition timely where filed 101 days prior to the expiration of the contract).

Merits of the Petition

Section 2(3) of the Act excludes from the definition of the term “employee” “any individual employed as a supervisor.” Section 2(11) of the Act defines a “supervisor” as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is to be interpreted in the disjunctive, so that the possession of any one of the enumerated authorities places the employee so invested in the supervisory class. *Ohio Power Co. v. NLRB*, 176 F.2d 385, 387 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949); *Allen Services Co.*, 314 NLRB 1060, 1061 (1994).

However, if every minor order made its issuer a supervisor, our industrial culture would be predominantly supervisory. *Providence Hospital*, 320 NLRB 717, 725 (1996), quoting *NLRB v. Security Guard Service*, 384 F.2d 143, 151 (5th Cir. 1967). The Board and courts are mindful not to deprive employees of their rights under Section 7 by interpreting the term supervisor too broadly. *Unifirst Corp.* 335 NLRB 706, 712-713 (2001); *Azusa Ranch Market*, 321 NLRB 811, 812 (1996); *Williamson Piggly Wiggly v. NLRB* 827 F.2d 1098, 1100 (6th Cir. 1987). Therefore, to separate straw bosses from true supervisors, the Act prescribes that the exercise of a supervisory indicium be in the interest of the employer and require the use of independent judgment. This means that neither the discharge of Section 2(11) functions in a routine or clerical manner, nor use of independent judgment to solve problems unrelated to Section 2(11) functions, qualifies as supervisory. *Alois Box Co.*, 326 NLRB 1177 (1998).

In *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001), the Supreme Court upheld the Board's longstanding rule that the burden of proving Section 2(11) supervisory status rests with the party asserting it. *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536 (1999); *The Ohio Masonic Home, Inc.*, 295 NLRB 390, 393 fn. 7 (1989); *Bowne of Houston, Inc.*, 280 NLRB 1222, 1223 (1986). As a result of that burden, any lack of evidence in the record is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities, Inc.*, supra.

While upholding the Board's rule regarding burden, the Court in *Kentucky River* rejected the Board's interpretation of the term "independent judgment" in Section 2(11) to exclude the exercise of "ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specific demands." 532 U.S. at 713. Although the Court found the Board's interpretation of "independent judgment" in this respect to be inconsistent with the Act, it recognized that it is within the Board's discretion to determine, within reason, what scope or degree of "independent judgment" meets the statutory threshold. *Id.*; see *Beverly Health & Rehabilitation Service*, 335 NLRB 635 fn. 3 (2001), enfd. in relevant part 317 F.3d 316 (D.C. Cir. 2003). Furthermore, the Court acknowledged that the term "independent judgment" is ambiguous as to the *degree* of discretion required to establish supervisory status and that such degree of judgment "that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer." 532 U.S. at 713-714.

In discussing the tension in the Act between the Section 2(11) definition of supervisors and the Section 2(12) definition of professionals, the Court also left open the question of the interpretation of the Section 2(11) supervisory function of

“responsible direction,” noting the possibility of “distinguishing employees who direct the manner of others’ performance of discrete tasks from employees who direct other employees.” *Id.* at 720; see *Majestic Star Casino*, 335 NLRB 407, 408 (2001). For instance, direction as to a specific and discrete task falls below the supervisory threshold if the use of independent judgment and discretion is circumscribed by the superior’s standing orders and the employer’s operating regulations, which require the individual to contact a superior when problems or anything unusual occurs. *Dynamic Science, Inc.*, 334 NLRB 391 (2001); *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995).

The Employer essentially concedes, and the record shows, that the nurses have never possessed statutory supervisory authority in the areas of hiring, layoff, recall, promotion, or reward. However, the Employer urges that at all material times, the nurses have had authority to responsibly direct employees, assign, transfer, train, evaluate, adjust grievances, discipline, and effectively recommend discharge. On this record, I do not agree.

Scheduling, Assignments, Responsible Direction, Transfers

Regarding the scheduling, assignment, direction and transfer of CNAs, the master work schedule and daily assignment sheets are centrally formulated so that the nurses receive a pre-printed assignment sheet for the CNAs. While the nurses assign the CNAs to particular residents, this is done on a three-day rotational basis without taking into account the skill level of a particular CNA. Although tasks to be performed for a given resident may vary day-to-day pursuant to medical needs or family requests, nothing in the record dispels the inference that variances fall within a set of normal, routine occurrences, such as bathing, feeding, ambulating, and transporting. The limited authority of nurses to modify tasks of CNAs based on standing medical orders or what is dictated by experience or routine protocol does not require the use of independent judgment in the direction of other employees. *Northern Montana Health Care Center*, 324 NLRB 752, 753 (1997), *enfd.* in relevant part 178 F.3d 1089 (9th Cir. 1999); see *Ferguson Electric Co.*, 335 NLRB 142, 147 (2001).

Subsequent assignments, reassignments, rescheduling of breaks, and directions by the nurses are patterned after the established schedule and practice in a manner which is essentially routine in nature, and does not require the exercise of independent judgment. Specifically, the nurses’ assignments to CNAs, including temporary details to another unit or wing, are merely reflective of patient census and the exigencies of workload needs, and require no more judgment than garnered by the nurses’ experience and training, and based on Employer policy and government regulation as to the number of CNAs needed to

serve a particular set of residents. *Hillhaven Rehabilitation Center*, 325 NLRB 202, 202-203 (1997); *Illinois Veterans Home at Anna L.P.*, 323 NLRB 890, 891 (1997). This does not suffice to impart supervisory status. *Northern Montana Health Care Center*, supra at 753.

Nurses on the day shift do not make telephone calls to secure additional aides to cover unanticipated staffing shortages. The nurses' authority on the afternoon and midnight shift to call in employees for staff shortages and send home employees in overstaffing situations, including the assignment of optional or mandatory overtime to CNAs, reflects the Employer's pre-determined staffing levels in accord with state regulations. Merely seeking voluntary replacements for absent employees does not constitute supervisory authority. *Youville Health Care Center, Inc.*, 326 NLRB 495, 496 (1998); *Providence Alaska Medical Center v. NLRB*, 121 F.3d 548, 552-553 (9th Cir. 1997); *Children's Habilitation Center, Inc. v. NLRB*, supra at 134.

Another purported element of the nurses' responsible direction is their role in checking and correcting CNAs' work. Generally, however, showing other employees the correct way to perform a task does not confer supervisory status. *Franklin Home Health Agency*, 337 NLRB 826, 831 (2002). The work of the CNAs is largely routine and absent exceptional circumstances does not require continuous supervision.

Training and Evaluations

I do not find that the nurses' authority to complete the nursing orientation sheets for newly hired nurses or the competency evaluation forms and CENA skills assessment check lists regarding CNA job performance confers supervisory status. There is no showing that these documents, by themselves, have any effect upon the new nurses or CNAs' job tenure or status. Because training and evaluating as such are not statutory indicia of supervisory authority, the Board has consistently declined to find supervisory status based on those duties without evidence that they constitute effective recommendations to reward, promote, discipline, or likewise affect the employees' job status. *Webco Industries*, 334 NLRB 608, 609-610 (2001) (training and evaluations); *Hillhaven Rehabilitation Center*, supra at 202 (1997); *Ten Broeck Commons*, 320 NLRB 806, 813 (1996); *Brown & Root, Inc.*, 314 NLRB 19, 21 (1994); *New York University Medical Center v. NLRB* 156 F.3d 405, 413-414 (2nd Cir. 1998); *Lynwood Health Care Center, Minnesota, Inc. v. NLRB*, 148 F.3d 1042, 1046-1047 (8th Cir. 1998).

Adjustment of Grievances

There is no evidence that the nurses are empowered to adjust any formal employee grievances. The limited authority exercised by the nurses to resolve interpersonal conflicts among employees does not confer supervisory status. *St. Francis Medical Center-West*, 323 NLRB 1046, 1048 (1997).

Discipline and Discharge

The nurses' responsibility in the area of discipline is solely to serve as a conduit by reporting misbehavior. The one-on-one educational inservices provided by the nurses have traditionally been unaccompanied by recommendations for further discipline. Clearly, they are merely incident reports that are utilized regarding the job performance of the CNAs and document an incident of violation of an Employer procedure or policy. The DON independently investigates and determines what level of discipline, if any, is warranted for misconduct and the record is void of any evidence suggesting that nurse recommendations are elicited in the process. The Board does not find reports or written warnings to be proof of supervisory authority unless they result in personnel action without independent investigation or review by others.

Northwest Nursing Home, 313 NLRB 491, 497-498 (1993); *Hillhaven Rehabilitation Center*, supra at 203. The Board has repeatedly held, with court approval, that a reportorial function is not sufficient to support a supervisory finding. *The Ohio Masonic Home, Inc.*, 295 NLRB 390, 394 (1989); *Waverly-Cedar Falls Health Care Center, Inc. v. NLRB*, 933 F.2d 626, 630 (8th Cir. 1991). *NLRB v. City Yellow Cab Co.*, 344 F.2d 575, 580-581 (6th Cir. 1965).

Discharge decisions are the province of the administrator and DON. Nurses are limited to making factual reports that are subject to additional scrutiny and investigation by the DON. Whatever authority a nurse possesses to eject an abusive or repeatedly insubordinate CNA from the facility is mandated by law or the Employer's policies. After the nurse has defused the situation, such incidents are subject to independent review and investigation by the administrator and/or DON. The taking of limited action in response to flagrant violations is insufficient by itself to establish supervisory status. *Vencor Hospital – Los Angeles*, 328 NLRB 1136, 1139 (1999); *Phelps Community Medical Center* 295 NLRB 492 (1989); *Loffland Bros.Co.*, 243 NLRB 74, 75 fn. 4 (1979).

Secondary Indicia

The existence of secondary indicia of supervisory status, such as the possession of keys, title, higher pay, and the like are, standing alone, insufficient

to demonstrate supervisory status. *Shen Automotive Dealership Group*, 321 NLRB 586, 594 (1996); *Billows Electric Supply*, 311 NLRB 878 fn.2 (1993).

The LPN and RN job descriptions that the Employer inherited from Trans Healthcare, Inc. and continues to utilize purports to vest nurses with authority to supervise nursing staff, determine staffing requirements, and train, evaluate, and discipline employees. However, the record does not establish that the nurses perform such functions for the Employer. I conclude that the job descriptions are a mere paper conveyance that do not impart actual supervisory authority. *Valley Slurry Seal Co.*, 343 NLRB No. 34, JD slip op. at 14 (Sept. 30, 2004); *Franklin Home Health Agency*, supra at 829; *Crittenton Hospital*, 328 NLRB 879 (1999). The completion of discharge documents for residents also is not indicative of supervisory status.

The Employer urges that the afternoon shift nurses working past 5:30 p.m., and midnight shift nurses for the whole of their shift, are the highest level nursing personnel on their respective units, and as a result possess supervisory authority. However, the absence of supervisors does not imply that nurses must be supervisors. Nothing in the statutory definition of supervisor suggests that service as the highest-ranking worker on site requires a supervisory finding. *Training School at Vineland*, 332 NLRB 1412 fn. 3 (2000). This is perhaps especially true in nursing care settings. As the court observed in *NLRB v. Hillview Health Care Center*, 705 F.2d 1461, 1467 (7th Cir. 1983):

Although on the evening (3 p.m. to 11 p.m.) and night (11 p.m. to 7 a.m.) shifts the licensed practical nurses are the highest-ranking employees on the premises, this does not ipso facto make them supervisors. A night watchman is not a supervisor just because he is the only person on the premises at night, and if there were several watchmen it would not follow that at least one was a supervisor.

Nursing duties performed at night when most patients are sleeping do not necessarily demonstrate supervisory authority because little personnel action occurs during off-shifts. *Beverly Manor Convalescent Centers*, 275 NLRB 943, 947 (1985) (“Little happens at night in a care center setting; the staff performs a holding action....”); see *Children’s Habilitation Center, Inc. v. NLRB* 887 F.2d 130, 133 (7th Cir. 1989) (“too facile a maneuver” to focus on nighttime ratio of supervisor to employees, because there is less need to supervise employees at night when residents are sleeping). Moreover, as far as the record discloses, nurses, even those on afternoons and midnights, have no authority outside their own units. Further, there is a regularly assigned on-call staff of nonunit RNs and

the DON, ADON and other stipulated management officials share on-call duties at all times.⁸

Finally, I note that if the nurses are supervisors about 26 to 29 percent of the Employer's nursing department staff of 63 to 68 employees would be supervisory. This is an unusually top-heavy ratio. *Beverly California Corp. v. NLRB*, 970 F.2d 1548, 1555-1556 (6th Cir. 1992) (classifying 25% of nursing home staff as supervisors makes ranks of supervisors "pretty populous"); *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1468 (7th Cir. 1983) (33% found to be high); *Airkoman, Inc.*, 230 NLRB 924, 926 (1977) (one to three ratio is unrealistic and excessively high). On the other hand, if the nurses are not supervisors, the percent of supervisors would be a reasonable 9-10%. *Beverly California Corp. v. NLRB*, supra (a 1-to-6 ratio of supervisors to non-supervisory employees is not remarkable); *NLRB v. Res-Care, Inc.*, supra (the court's finding resulted in a 1-to-8 ratio of supervisors to non-supervisory employees).

Conclusion

For the reasons set forth above and the record as a whole, I conclude that the Employer has not sustained its burden in establishing that the RN and LPN staff nurses are supervisors. Thus, I find that they are employees.

Accordingly, **IT IS ORDERED** that the Petitioner's request to clarify the bargaining unit by excluding staff nurses is denied and the petition is dismissed.⁹

Dated at Detroit, Michigan, this 16th day of June, 2006.

"/s/[Stephen M. Glasser]."

(SEAL)

/s/ Stephen M. Glasser

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⁸ The Employer does not seek to exclude unit RN Donna Lennard from the unit solely on the basis that she serves as an on-call RN for one week every five to six weeks. I find that her infrequent service in that capacity does not require her exclusion from the unit. See *Training School at Vineland*, supra at 1417. In addition, Lennard's voluntary training assignments is not significant indicia of supervisory status, especially since the training mostly involves employees not employed by the Employer. See *Douglas Aircraft Co.*, 238 NLRB 668, 671 (1978).

⁹ Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, Franklin Court, 1099 14th Street N.W., Washington D.C. 20570**. This request must be received by the Board in Washington by June 30, 2006.